**CASE NO. S_____**

**IN THE SUPREME COURT OF CALIFORNIA**

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**STAND UP FOR CALIFORNIA! et al.,**
*Plaintiffs and Appellants*,

**v.**

**STATE OF CALIFORNIA et al.,**
*Defendants and Respondents,*

**NORTH FORK RANCHERIA OF MONO INDIANS,**
*Intervenor and Respondent.*

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# PETITION FOR REVIEW

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After Decision of the Court of Appeal of the State of California,
Fifth Appellate District, Case No. F069302

On Appeal from the Superior Court of the State of California,
County of Madera, Case No. MCV062850,
Hon. Michael J. Jurkovich

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## ISSUE PRESENTED

The federal Indian Gaming Regulatory Act (IGRA) permits an Indian tribe to conduct gaming on tribal lands acquired after IGRA's enactment if, among other things: (1) the Secretary of the Interior issues a "two-part determination" concluding that such gaming would be (a) in the tribe's best interest and (b) not detrimental to the surrounding community, and (2) the relevant state governor concurs in that determination. In *United Auburn Indian Community of the Auburn Rancheria v. Newsom* (*United Auburn*) (2020) 10 Cal.5th 538, this Court granted review to "resolve the split" between the Third and Fifth Districts over the validity of two such concurrences issued by the Governor on the same day in 2012—one for the tribe at issue in *United Auburn* and one for petitioner North Fork Rancheria of Mono Indians (North Fork). (*Id.* at p. 548.) The Court "h[e]ld that California law empowers the Governor to concur." (*Id.* at p. 543.) On remand, however, the Fifth District held that *United Auburn* was "distinguishable" and ruled that the Governor's concurrence had been "impliedly annulled" retroactively, by a subsequent voter referendum invalidating a separate statute ratifying the gaming compact between North Fork and the State. (Opn. 2.)

The issue presented is:

Whether a referendum can, by implication, retroactively annul the Governor's concurrence in a two-part determination under IGRA, in light of this Court's holding that such a concurrence is an "executive" act that "California law empowers the Governor" to take (*United Auburn*, *supra*, 10 Cal.5th at pp.

543, 559) and in light of the constitutional requirement that referenda concern "statutes" (Cal. Const. art. II, § 9).

## REASONS TO GRANT REVIEW

The Fifth District's decision contravenes both this Court's ruling in *United Auburn* and the plain text of the California Constitution, and upends settled law, to create an extraordinary expansion of the referendum power—thus jeopardizing the Governor's ability to exercise his executive authority, including his long-established role as the State's representative in numerous cooperative-federalism schemes. This Court's review is thus necessary to "secure uniformity of decision" and "to settle an important question of law"—whether, and under what circumstances, a voter referendum can retroactively annul an executive act. (See Cal. R. Ct. 8.500(b)(1).)

As an initial matter, review is necessary to secure uniformity of decision regarding the Governor's power to concur in two-part determinations under IGRA. This Court directed the Fifth District to reconsider its prior decision invalidating the Governor's concurrence in light of *United Auburn*'s holding that California law empowers the Governor to concur. But the Fifth District did not faithfully comply with this Court's direction, and the reasoning and result of the decision below cannot be reconciled with *United Auburn*. The Fifth District's prior decision rested on the premise that any concurrence power was merely ancillary to the Governor's power to negotiate compacts; Justice Smith's lead opinion therefore concluded that where there was no valid compact, there could be no valid concurrence. (*Stand Up for California! v. State of California* (2016) (*Stand Up*

*I*) 6 Cal.App.5th 686, 699-700.) *United Auburn* rejected that reasoning, concluding that the power to concur did not depend on the power to negotiate a compact, (10 Cal. 5th at pp. 550-551, 559-562), and upholding the Governor's concurrence even though there was no valid compact for the tribe in that case, as the Legislature had never ratified it. (*United Auburn*, *supra*, 10 Cal. 5th at p. 573 (Cantil-Sakauye, C.J., dis.).) Yet, on remand, the Fifth Circuit once again held that the rejection of North Fork's compact invalidated the Governor's concurrence, relying on the lone distinction between *United Auburn* and this case: The Legislature *did* ratify North Fork's compact, but the ratification was undone by referendum.

*United Auburn* forecloses the Fifth District's effort to preserve its prior holding based on that distinction. This Court held that the Governor's concurrence power did not arise from or depend on his compacting power, and that it was instead part of his inherent executive authority. (*United Auburn*, *supra*, 10 Cal. 5th at pp. 550-551, 559-562). The rejection of North Fork's *compact*—whatever the procedural mechanism—thus cannot annul the Governor's *concurrence*. As this Court repeatedly made clear, there has been no legislative act limiting the Governor's independent and inherent concurrence power. "That the Legislature has enacted no such law means the power to concur remains in the Governor's hands." (*Id.* at p. 565.)

Moreover, even setting aside the Fifth District's failure to follow this Court's direction and faithfully apply *United Auburn*, its decision requires this Court's review because it addresses and

wrongly resolves an important question of law with broad implications—the reach of the referendum power and its application to actions by the executive. The Court of Appeal was unable to point to any authority supporting its holding that an executive act can be annulled—much less retroactively and impliedly annulled—by referendum. That is unsurprising, given that the Constitution expressly provides that "[t]he referendum is the power of the electors to approve or reject *statutes or parts of statutes*[.]" (Cal. Const., art. II § 9, subd. (a) [emphasis added].) The referendum power is the reserved right of the people to oversee the actions taken by the *Legislature*—not the Governor. (*American Fed'n of Labor v. Eu* (*Eu*) (1984) 36 Cal.3d 687, 707-708; see also Cal. Const., art. IV § 1.)

The Fifth District's tortured reasoning that executive acts with any "legislative aspect" are "statutes" subject to annulment by referendum (Opn. 19) ignores the ordinary, common-sense meaning of the word "statute." It also directly contravenes *Eu*, which held that "statutes" are limited to enacted laws and do not even encompass other actions by the Legislature (*Eu*, *supra*, 36 Cal.3d at pp. 708-714)—let alone actions by the Governor. To make matters worse, the Fifth District's decision would eliminate in the context of executive acts the 90-day limit the Constitution imposes on referenda to invalidate actual statutes, and would permit executive acts to be annulled retroactively, after or even long after they have taken effect and other governments and citizens have relied on them. (Cal. Const., art. II, § 9, subd. (b).) Moreover, the Fifth District's decision would allow referenda to

annul executive acts "impliedly," even if their text makes no reference to those acts— just as Proposition 48, the referendum at issue here, made no reference to the Governor's concurrence. In sum, the Fifth District's decision would grant voters a sweeping and unprecedented power to undo decisions the executive branch has already implemented.

The Fifth District's legal errors will have potentially disastrous consequences for the basic workings of this State's government. If referenda can annul executive acts long after they occurred—and do so by implication—it would be impossible to rely on any action by the Governor. Even if the Court of Appeal's holding is limited to executive acts with some "legislative" aspect, that covers a wide range of executive actions, given that the functions of the three branches are not hermetically sealed and frequently overlap. (*See United Auburn, supra*, 10 Cal.App.5th at pp. 558-559). For instance, the decision below would endanger the State's ability to participate in numerous cooperative federalism schemes, since the Governor could no longer reliably play his role of determining the State's position and conveying it to the federal government if his decision could be annulled by referendum at any time in the future. The pernicious effects of the Fifth District's decision apply not just to future gubernatorial acts, but to past acts as well, unsettling any number of executive actions previously thought to be final. And because the Fifth District's decision allows for invalidation of executive acts by implication, any referendum relating to the same or a similar subject area as an executive act could

potentially be wielded in litigation as an implicit repudiation of that act. The executive cannot function under such a cloud of uncertainty. This Court should grant review to dispel that cloud and preserve the Governor's ability to govern.

## STATEMENT OF THE CASE

### A. Federal And State Law Regarding Gaming On Indian Lands

Indian tribes are sovereign governments that retain the inherent authority to govern their own land and people, subject only to regulation by Congress. States have no authority to regulate gaming on Indian lands absent congressional authorization. (See *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 207, 222; see also *United Auburn*, *supra*, 10 Cal. 5th at 545-546.) Accordingly, in 1988, Congress enacted IGRA, which provides a legal framework for Indian gaming and grants states a limited role in determining the parameters of commercial "casino-style" gaming (referred to in IGRA as "class III" gaming) on Indian lands. (See 25 U.S.C. § 2702, subd. (1); *id.* § 2710, subd. (d).)

As relevant here, IGRA provides that such "casino-style" gaming is authorized if it is "located in a State that permits such gaming for any purpose by any person, organization, or entity" and if it is conducted either "in conformance with a Tribal-State compact" (25 U.S.C. § 2710, subd. (d)(1)) or pursuant to procedures imposed by the Secretary of the Interior (*id.* § 2710, subd. (d)(7)). IGRA contemplates that a tribe seeking to conduct casino-style gaming will first attempt to obtain a gaming compact with its home state (*id.* § 2710, subd. (d)(1)(C)); IGRA requires

the state to negotiate "in good faith to enter into such a compact" (*id.* § 2710, subd. (d)(3)(A)). If a federal court finds that the state has not negotiated in good faith, IGRA provides a remedial process under which, if the state continues to refuse to enter into a compact, a tribe may commence casino-style gaming under procedures imposed by the Secretary without the state's agreement being required. (*Id.* § 2710, subd. (d)(7).)

Until 2000, the California Constitution prohibited "casinos of the type currently operating in Nevada and New Jersey," thus barring most types of casino-style gaming on Indian lands. (*Hotel Emps. & Rest. Emps. Int'l Union v. Davis* (1999) 21 Cal.4th 585, 589) [discussing Cal. Const., art. IV, § 19, subd. (e)].) In March 2000, however, voters approved Proposition 1A, a constitutional amendment permitting casino-style gaming on tribal lands pursuant to federal law. The California Constitution now provides:

> Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law.

(Cal. Const., art. IV, § 19, subd. (f).)

While IGRA generally prohibits gaming on land acquired in trust for an Indian tribe after IGRA's enactment in 1988, it permits gaming on such lands if, among other requirements: (1) the Secretary of the Interior issues a two-part determination

finding that such gaming would be (a) in the tribe's best interest and (b) not detrimental to the surrounding community, and (2) the relevant state's governor concurs in that determination. (25 U.S.C. § 2719, subd. (b)(1)(A).) A "governor's role under § 2719(b)(1)(A), is limited to satisfying one precondition to the Secretary of the Interior's authority under § 2719(b)(1)(A), to permit gaming on after-acquired trust land." (*Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States* (*Lac Courte*) (7th Cir. 2004) 367 F.3d 650, 661.) In other words, the ability to concur does not make the Governor "Emperor of tribal gaming"—the Governor may concur in the Secretary's determination to allow gaming on newly acquired lands only if the Secretary first makes the necessary findings under § 2719, subdivision (b)(1)(A), and all of IGRA's other requirements are met. (*United Auburn, supra*, 10 Cal. 5th at p. 557 n.7.)

### B. North Fork's Project, The Secretary's Two-Part Determination, And The Governor's Concurrence

Petitioner North Fork is a federally recognized Indian tribe with more than 2,000 tribal citizens, whose ancestors occupied lands in the Sierra foothills and the San Joaquin Valley for countless generations. The Tribe's members suffer from widespread unemployment and poverty; the Tribe itself is dependent on limited federal and state funding; and the Tribe has no meaningful avenues for economic development other than the gaming project at issue in this case. Until 2013, the only land held in trust for the Tribe was rugged, environmentally sensitive

land near the Sierra National Forest, which is unsuitable for significant commercial development.

In 2005, North Fork requested that the Secretary take into trust for its benefit a 305-acre parcel in Madera County, about 35 miles from its tribal headquarters (the Madera Site), so that North Fork could develop a resort hotel and casino on the site to support tribal government and services, as envisioned by IGRA. (See 25 U.S.C. §§ 2702, 2710, subd. (b)(2)(B).) In 2011, the Secretary issued a two-part determination concluding that North Fork's project would be in the Tribe's best interest and would not be detrimental to the surrounding community, and requested the Governor's concurrence in that determination. (See *id.* § 2719, subd. (b)(1)(A).)

On August 30, 2012, California's Governor concurred in the two-part determination for North Fork and in a separate two-part determination for the Enterprise Rancheria of Maidu Indians (Enterprise). (Opn. 6; *United Auburn*, *supra*, 10 Cal. 5th at 547.) The next day, the Governor executed tribal-state gaming compacts with both Enterprise and North Fork. (Opn. 6; *United Auburn*, *supra*, 10 Cal. 5th at 547.) The Governor then sent the executed compacts to the Legislature for ratification. (Opn. 6.) The Legislature never ratified the Enterprise compact. (*United Auburn, supra,* 10 Cal. 5th at p. 573 (Cantil-Sakauye, C.J., dis.).) The Legislature did ratify the North Fork compact (together with a compact for another tribe, the Wiyot) by passing Assembly Bill No. 277, which the Governor signed into law on July 3, 2013.

The California Constitution grants voters the power to approve or reject "statutes" by referendum if a petition with the requisite number of signatures is presented to the Secretary of State within 90 days after the statute's enactment. (Cal. Const., art. II, § 9.) Within 90 days after AB 277's enactment (but well over a year after the Governor's concurrence), respondent Stand Up for California! (Stand Up) submitted a petition with the requisite number of signatures, qualifying a referendum on AB 277 for the next general election. (Opn. 8.) The text of the referendum, which was designated Proposition 48, stated: "A 'Yes' vote approves, and a 'No' vote rejects, a statute that: Ratifies tribal gaming compacts between the state and the North Fork Rancheria of Mono Indians and the Wiyot Tribe."[1] On November 4, 2014, electors voted "No" on the referendum, thus rejecting the statute that ratified North Fork's compact.[2]

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[1] *Voting Information Guide for 2014, General Election* at 40, UC HASTINGS SCHOLARSHIP REPOSITORY (2014). <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2328&context=ca_ballot_props> [as of June 22, 2021].

[2] After the referendum, North Fork sought to negotiate a new compact with the State for casino-style gaming on the Madera Site. The State refused, so North Fork sought relief in federal court under IGRA's remedial process. (See 25 U.S.C. § 2710, subd. (d)(7).) The federal court found that the State had failed to negotiate in good faith with North Fork, as IGRA required. (*North Fork Rancheria v. California* (E.D. Cal. Nov. 13, 2015, No. 15-cv-419), Dkt. 25.) After mediation failed to result in an agreed compact, in July 2016, the Secretary issued procedures under which North Fork could conduct casino-style gaming on the Madera Site. (See 25 U.S.C. § 2710, subd. (d)(7)(vii).)

### C. Proceedings In This Case Before The Decision Below

Opponents of the Enterprise and North Fork gaming projects challenged the Governor's authority to concur in the two-part determinations.[3] Two Courts of Appeal reached different results, with the Third District holding unanimously in Enterprise's case that the Governor had the power to concur and the Fifth District holding in North Fork's case that the Governor lacked that power. (See *United Auburn, supra*, 10 Cal.5th at p. 548.)

Notably, the Fifth District Justices did not agree on a rationale for that outcome. Rather, each Justice wrote separately, articulating three different theories. All the Justices agreed that the Governor's concurrence power, if any, must be limited to acts necessary to effectuate the Governor's compacting authority under Proposition 1A. (*See Stand Up I*, *supra*, 6 Cal.App.5th at pp. 699-700, 704 (Smith, J.); *id.* at p. 712-715 (Detjen, J.); *id.* at pp. 758-760 (Franson, J.).) They differed, however, on the specific limitations Proposition 1A imposed. Justice Smith concluded that because "the point of the implied concurrence power would be to give effect to the state's compacting power," the "concurrence power would not extend to

[3] Respondent Stand Up and others also brought suit in federal court, challenging the Secretary's two-part determination for North Fork. The district court rejected Stand Up's challenges, the D.C. Circuit affirmed, and the U.S. Supreme Court declined to grant review. (*Stand Up for California! v. U.S. Dept. of Interior* (D.D.C. 2016) 204 F.Supp.3d 212, affd. 879 F.3d 1177 (D.C. Cir. 2018), cert. den. Jan. 7, 2019, 139 S. Ct. 786.)

lands as to which there is no state-approved compact." (*Id.* at p. 698.) Accordingly, since North Fork had no valid compact, the Governor's concurrence likewise must be invalid. (*Ibid.*) Justice Detjen reasoned that even assuming the Governor had the implied power to concur to effectuate a compact, he could not concur in gaming on land that had not yet been taken into trust, because Proposition 1A authorized the Governor to negotiate and conclude compacts only for gaming "on Indian lands." (*Id.* at pp. 714-715.) Finally, Justice Franson concluded that the Governor could never concur in a two-part determination under IGRA because most compacts do not require a concurrence, voters would not have understood Proposition 1A to confer the power to concur, and Proposition 1A was merely an exception to the Constitution's general prohibition on casino gambling, which eliminated any authority the Governor might otherwise have to concur in gaming on newly acquired land. (*Id.* at pp. 767-768.)

This Court granted review of the Third District and the Fifth District cases "to resolve the split" (*United Auburn*, *supra*, 10 Cal.5th at p. 548) over the Governor's authority, and did so in *United Auburn* by unequivocally "hold[ing] that California law empowers the Governor to concur" (*id.* at p. 543). This Court explained that the California Constitution, which authorizes the Governor to "negotiate and conclude compacts, subject to ratification by the Legislature," for tribal gaming "on Indian lands in California in accordance with federal law" (Cal. Const., art. IV, § 19, subd. (f)), neither empowers the Governor to concur in IGRA determinations, nor precludes the Governor from doing

so. (*United Auburn, supra,* 10 Cal.5th at pp. 550-558.) Moreover, the Court held that—while it might have some "legislative … features"—"the concurrence power is an executive one" inherent in the Governor's long-standing role as the State's representative in a variety of cooperative federalism schemes like IGRA. (*Id.* at pp. 559-560.) The Governor may thus exercise that power as long as the Legislature has not forbidden it. (*Id.* at pp. 561-564.) And while "lawmakers remain free to restrict or eliminate the Governor's authority to concur," this Court made clear that they "haven't done so yet." (*Id.* at p. 565.) "[I]n the absence of a state law creating … a limitation" on the Governor's concurrence power, this Court admonished, courts "may not enact one on the Legislature's behalf." (*Id.* at p. 564.)

Having "resolve[d] the split" among the Courts of Appeals (*id.* at p. 548) by upholding the Governor's concurrence power, this Court returned North Fork's case to the Fifth District "with directions to vacate its decision and reconsider the matter in light of *United Auburn*." (*Stand Up for California! v. State of California* (2020) 269 Cal.Rptr.3d 200, 200 (mem.).)

### D. The Fifth District's Ruling On Remand From *United Auburn*

On remand, despite this Court's admonition that courts may not enact limitations on the Governor's concurrence power, the Fifth District did exactly that. It opined that *United Auburn* was "distinguishable" and reinstated its prior holding that the Governor lacked the authority to concur in the Secretary's two-part determination. (Opn. 2.)

Seizing on this Court's statement that "the Legislature may restrict or eliminate" the Governor's concurrence power, the Fifth District concluded that Proposition 48—the referendum that invalidated the statute ratifying North Fork's compact—was a "legislative act" eliminating the Governor's power to concur as to North Fork. (Opn. 18-20.) The Court of Appeal acknowledged that "[t]he power of referendum is 'the power of the electors to approve or reject statutes or parts of statutes.'" (Opn. 19.) But it reasoned that this Court had characterized the concurrence power as having legislative as well as executive features; that a concurrence was therefore a "legislative act"; and that the Constitution's phrase "statutes or parts of statutes" should be read liberally to encompass *any* legislative action. (*Ibid.*) Accordingly, the Fifth District concluded that a referendum can annul a Governor's concurrence. (*Ibid.*)

The Fifth District further concluded that such an annulment can occur retroactively, unlike with statutes enacted by the Legislature, which do not take effect until the 90-day period after enactment has passed without a referendum being presented to the Secretary of State or, if a referendum has qualified for the ballot, voters have upheld the statute. (Cal. Const., art. IV, § 8 [statutes generally go into effect at least 90 days after enactment in the absence of a referendum, except for "[s]tatutes calling elections, statutes providing for tax levies or appropriations …, and urgency statutes" which go into effect immediately]; see also *Assembly of State of California v. Deukmejian* (1982) 30 Cal.3d 638, 656-657 [the filing of a valid

referendum challenging a statute within the constitutional 90-day period stays implementation of that statute until after the vote of the electorate].) Here, notwithstanding that the Governor's concurrence was made and took effect on August 30, 2012, Proposition 48 was not presented until October 2013, well outside the 90-day limit, and the concurrence was "annulled"—in the Fifth District's view—in November 2014, more than two years after it took effect. (Opn. 15-17.)

Going still further, the Fifth District held that a referendum can "impliedly annul" an executive act, and that Proposition 48 had so impliedly annulled the Governor's concurrence. (Opn. 20.) The Court of Appeal admitted that Proposition 48's "official title and summary … do not expressly reference the concurrence power" or the North Fork concurrence; rather, Proposition 48 expressly addressed only the statute ratifying North Fork's tribal-state compact. (*Ibid.*) It reasoned, however, that because the Governor's concurrence power was itself "implicit," "the people may impliedly annul an exercise of that power." (Opn. 21.) And it extended this false equivalence in concluding that the voters' rejection of the compact ratification necessarily implied a rejection of any action by the Governor that was a step toward gaming on the Madera Site. (*Ibid.*) Effectively, the Fifth District resuscitated Justice Smith's prior reasoning that there can be no concurrence without a compact, notwithstanding this Court's rejection of that view.

North Fork did not file a petition for rehearing with the Court of Appeal.

## LEGAL DISCUSSION

### I. REVIEW IS NECESSARY BECAUSE THE FIFTH DISTRICT'S DECISION EVADES THIS COURT'S RECONSIDERATION ORDER AND CONTRAVENES *UNITED AUBURN*

This Court has already granted review of this case once to resolve the important question it presents: Whether the Governor has the power to concur in the Secretary's two-part determination under IGRA permitting a tribe to game on newly acquired trust lands, independent of the Governor's authority under the California Constitution to negotiate and conclude tribal-state compacts. In *United Auburn*, the Court gave an unequivocal answer to that question: "Yes." It thereby "resolve[d] the split" between the Fifth District and the Third District (*United Auburn, supra,* 10 Cal.5th at p. 548) and squarely repudiated both the Fifth District's ultimate holding and the premise underlying each of the Justices' separate opinions—that any gubernatorial concurrence power is limited to acts necessary to implement the Governor's compacting authority. Rather, this Court held that "the concurrence power is an executive one" within the Governor's inherent authority and not tied to the compacting power. (*Id.* at p. 559.) This Court also repeatedly stressed that although the Legislature could potentially enact a law restricting or eliminating the Governor's power to concur, *it has not done so,* and therefore "the power to concur remains in the Governor's hands." (*Id.* at p. 565; see also *id.* at pp. 544, 563, 564.) The Court then remanded this case to the Fifth District with instructions to vacate and reconsider its prior judgment in light of *United Auburn*.

On remand, the Fifth District purported to distinguish *United Auburn* and reinstated its holding that the Governor lacked the authority to concur in the two-part determination for North Fork. But this Court's holding and reasoning in *United Auburn* left no room for the Fifth District to reach a contrary outcome on remand in this materially identical case. *United Auburn* involved the Governor's August 30, 2012 concurrence in the Secretary's two-part determination that Enterprise should be permitted to conduct gaming on newly acquired trust land. (See *supra* p. 16.) This case involves the Governor's August 30, 2012 concurrence in the Secretary's two-part determination that North Fork should be permitted to conduct gaming on newly acquired trust land. (See *ibid.*) In *United Auburn,* Enterprise had no valid tribal-state gaming compact. (See *ibid.*) In this case, North Fork has no valid tribal-state gaming compact. (See *supra* p. 17.)

There is only one factual distinction between the two cases. In *United Auburn*, the Legislature never ratified Enterprise's compact at all, whereas here the Legislature ratified North Fork's compact, but the ratifying statute was invalidated by referendum. According to the Fifth District, the distinction between an invalidated legislative act and legislative inaction makes all the difference: The referendum rejecting the statute ratifying North Fork's compact, it says, is the equivalent of legislation eliminating the Governor's power to concur in the North Fork two-part determination and thus retroactively annulling the concurrence. (Opn. 21-23.) As *United Auburn* makes clear, however, the referendum is no such thing.

First, as discussed, *United Auburn* held that the power to concur is not tied to or limited by the Governor's compacting power, but is instead an inherent executive authority independent of the constitutionally granted authority to negotiate and conclude compacts. (See *United Auburn*, *supra*, 10 Cal. 5th at p. 554 ["[T]he power to negotiate compacts with Indian tribes does not, by itself, imply the power to concur."].) Even the dissenting Justices agreed that "[t]he Governor's involvement with a compact is of a qualitatively different nature from his concurrence." (*Id.* at p. 576 (Cantil-Sakauye, C.J., dis.).) Accordingly, the status of a tribe's compact simply does not matter to the question whether the Governor may concur in a two-part determination for that tribe.

Nor does *United Auburn* suggest that the particular procedural mechanism leading to an invalid compact makes a difference. The Fifth District's decision never explains why voters' invalidation of the statute ratifying North Fork's compact is a legislative act annulling the Governor's concurrence, but the Legislature's refusal to ratify Enterprise's compact in the first place is not such an act. And there is no rationale supporting such a distinction.

Second, this Court was well aware of the 2014 referendum invalidating the ratification of North Fork's compact when it decided *United Auburn*. Indeed, the facts of this case, including the referendum, were discussed at length in the dissent. (*United Auburn*, *supra*, 10 Cal. 5th at p. 574 [explaining that "[i]n *Stand Up!*, the Governor issued a concurrence in connection with an off-

reservation casino proposed by [North Fork] and negotiated a compact for gaming operations by the tribe … [b]ut the compact was made subject to a voter referendum … [and] was rejected by the voters"].) This Court nonetheless stated without qualification that "the Legislature has imposed no … restriction" on the Governor's concurrence authority and that "current California law" therefore permits the Governor to concur. (*Id.* at pp. 544, 564.) On the Fifth District's view, this Court fundamentally misapprehended, and repeatedly misstated, "current California law." But it is this Court's statement of the law—not that of a lower court—that is controlling.

Had the Fifth District conscientiously followed this Court's holding and reasoning in *United Auburn*, it would have been compelled to uphold the Governor's concurrence. This Court should grant review to enforce its mandate and ensure that lower courts obey its instructions on remand and faithfully apply its decisions. (See, e.g., *People v. Lawrence* (2000) 24 Cal.4th 219, 225; *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 411; *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 237; see also *People v. Wyatt* (2010) 48 Cal.4th 776, 778 [reversing where Court of Appeal "misapplied the mens rea assault standard as stated in" this Court's precedent]); *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1008-1009 [reversing where the Court of Appeal "misapplied" this Court's precedent]).

## II. REVIEW IS NECESSARY TO SETTLE IMPORTANT QUESTIONS OF LAW REGARDING THE REACH OF THE REFERENDUM POWER

The Fifth District's decision also requires this Court's review for an independent reason: Its novel ruling that a referendum can be used to annul an executive act—retroactively and by implication, no less—upends settled law and contravenes the text of the California Constitution.

### A. A Referendum Cannot Invalidate *Executive* Action

"The referendum is the power of the electors to approve or reject *statutes or parts of statutes*[.]" (Cal. Const., art. II, § 9 [emphasis added].) The Fifth District cited no precedent for its casual expansion of the referendum power to exercises of the Governor's inherent executive authority, and for good reason: It is unprecedented. In the 110 years since the initiative and referendum powers were added to the California Constitution, no case from any court has held that the referendum applies to an executive act taken by the Governor.

Indeed, in light of the Constitution's explicit limitation of the referendum to approving or rejecting "statutes or parts of statutes," this Court has held that the referendum does not even extend to "all possible actions of a legislative body." (*Eu, supra*, 36 Cal.3d at p. 708.) The target of a referendum (or an initiative) "must be initiated by a bill, passed with certain formalities, and presented to the Governor for signature." (*Id.* at pp. 708-709). Put differently, "the constitutional referendum … operates after [the Legislature] has done its work and has produced 'a statute enacted by a bill passed by the Legislature.'" (*Santa Clara Cty.*

*Local Trans. Auth. v. Guardino* (1995) 11 Cal.4th 220, 241.) Accordingly, an initiative or referendum that "seeks to do something other than enact [or repeal] a statute … is not within the … power reserved by the people." (*Eu*, *supra*, 36 Cal.3d at pp. 713-714 [holding invalid a proposed initiative that—if enacted—would have required the Legislature to issue a resolution in favor of an amendment to the U.S. Constitution]; see also *Guardino*, *supra*, 11 Cal.4th at p. 241 ["[T]he referendum is limited in its operation to the adoption or rejection of legislation *already enacted by a legislative body*.] [italics in original].)[4]

The Fifth District makes no mention of this Court's foundational decisions in *Eu* and *Guardino*. Instead, it reasoned as follows. First, the court "interpret[ed] the phrase 'statutes or parts of statutes' as referring to legislative actions." (Opn. 19.) Next, it cited this Court's observation in *United Auburn* that the concurrence power "is not wholly legislative or executive, but cuts across both categories." (*Ibid.*) Finally, it concluded that "[t]he legislative aspect of the concurrence renders it subject to the power of referendum." (*Ibid.*)

Simply put, this analysis makes no sense. The term "statute" has an ordinary meaning—"a law enacted by a legislative body." (*Black's Law Dictionary* (11th ed. 2019); see also *Guardino, supra*, 11 Cal.4th at p. 241 [the proper subject of a referendum is "legislation … enacted by a legislative body"].) A

[4] While *Eu* dealt with an initiative, this Court treated the referendum power as having the same scope (E.g., *Eu*, *supra*, 36 Cal.3d at pp. 697, 699-701, 703, 707-708.)

gubernatorial concurrence is not a "law," nor is it "enacted by a legislative body." Indeed, it is not a "legislative action" at all. This Court held in *United Auburn* that while it may have a "legislative" aspect (in the same sense as many executive actions that affect policy), "*the concurrence power is an executive one*" and that a concurrence was not "'gubernatorial legislation.'" (*United Auburn*, *supra*, 10 Cal.5th at p. 559 [italics added].)

The Fifth District also relied on "the general rule" that the Constitution's "referendum provision [should] be liberally construed to uphold the power." (Opn. 18.) But this Court has made clear that this principle cannot be used to expand the scope of the referendum power beyond statutes enacted by the Legislature and signed by the Governor. Specifically, *Eu* held that "even under the most liberal interpretation [of] the reserved powers of initiative and referendum[,] … those powers are limited … to the adoption and rejection of 'statutes.'" (*Eu*, *supra*, 36 Cal.3d at p. 708; see also *Worthington v. City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1141 [while "[i]t is the 'duty of the courts to jealously guard' the people's rights of initiative and referendum, … a fundamental principle of referendum law is that a referendum may be used to review only legislative acts[.]"].)

In short, the referendum cannot be used to "annul" the Governor's concurrence, which is undeniably not a "statute" or "part of a statute." By erasing this important distinction, the Fifth District's decision improperly extends the referendum power to a gubernatorial action that was taken without any legislative involvement whatsoever. (See *Pacific Rock & Gravel*

*Co. v. City of Upland* (1967) 67 Cal.2d 666, 669 ["[e]xecutive or administrative acts are not subject to the power of referendum"].)

### B. A Referendum Cannot *Retroactively* Invalidate Government Action

The Fifth District exacerbated its error by holding that a referendum can *retroactively* invalidate an executive act, after or even long after the act has taken effect. That holding, too, contravenes the constitutional limitations on referenda.

The Constitution provides that before a referendum may be placed on the ballot, its proponents must "present to the Secretary of State, *within 90 days after the enactment date of the statute*, a petition certified to have been signed by electors equal in number to 5 percent of the votes for all candidates for Governor at the last gubernatorial election." (Cal. Const., art. II, § 9, subd. (b) [italics added]; see also Cal. Elec. Code § 9014, subd. (c) [delegating authority "to county election officials" to receive petition with signatures].) Here, the Governor concurred in the Secretary's two-part determination for North Fork on August 30, 2012. (Opn. 4.) The compact with North Fork was ratified pursuant to AB 277 and signed into law on July 3, 2013. (Opn. 7.) Stand Up then submitted the requisite number of signatures on October 1, 2013, and the electors voted "No" on the referendum (meaning that AB 277 was invalidated) on November 4, 2014. (*Ibid.*)

Thus, even if the Governor's concurrence were a "statute" (and, as discussed above, it was not), the petition to put Proposition 48 on the ballot would not have been timely with respect to the concurrence. The Fifth District's ruling thus

necessarily holds not only that executive acts may be annulled by referendum, but that the constitutional 90-day limit does not apply to referenda that invalidate executive acts. Again, that ruling defies the text of the Constitution, which makes no such distinction. Nor does it make any sense, as it would mean that the referendum power—which, again, is expressly addressed to "statutes"—would sweep in a far greater range of executive actions than it does laws that are "initiated by a bill, passed with certain formalities, and presented to the Governor for signature." (See *supra* p. 27.)

Equally troubling is that the Fifth District's decision allows referenda retroactively to "annul" executive acts that, like the Governor's concurrence here, were valid and effective when they were made, regardless of any actions that other governments or private parties may have taken in reliance on those executive acts. (See *Strauss v. Horton* (2009) 46 Cal.4th 364, 473, abrogated on other grounds by *Obergefell v. Hodges* (2015) 132 S.Ct. 2584 ["[R]etroactive application of a new measure may conflict with constitutional principles if it deprives a person of a vested right without due process of law."] [internal quotation marks omitted]; see also *In re E.J.* (2010) 47 Cal.4th 1258, 1278 [retroactive application of a ballot measure violates Due Process when there is an "affirmative action" taken in reliance of state law prior to the effective date of the Proposition.].) The Constitution includes safeguards to prevent that from occurring with actual statutes, since the filing of a valid referendum challenging a statute within the constitutional 90-day period

stays implementation of that statute until after the vote on the referendum (see *Deukmejian, supra*, 30 Cal.3d 638 at pp. 656-657), and the Constitution itself exempts various types of statutes that have already gone into effect from the reach of the referendum power (compare Cal. Const., art. II, § 9(a) [exempting "urgency statutes, statutes calling elections, and statutes providing for tax levies or apportionments" from referendum power]; *id.* art. IV, § 8 (all statutes go into effect at least 90 days after enactment, except "[s]tatutes calling elections, statutes providing for tax levies or appropriations …, and urgency statutes," which go into effect immediately). The Fifth District does not even acknowledge, let alone address, this perverse effect of its decision.

### C. A Referendum Cannot *Impliedly* Invalidate Government Action

Finally, the Fifth District made its ruling even more sweeping—and even more problematic—by wrongly holding that a referendum can "impliedly annul" government action that its text does not even mention. (Opn. 20-21.)

When the text of a ballot measure is clear, courts "'presume the voters intended the meaning apparent from that language, and [] may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language.'" (*People v. Superior Ct. (Pearson)* (2010) 48 Cal.4th 564, 571.) In other words, "voters should get what they enacted, not more and not less." (*Ibid.*; see also *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933-934 [a ballot measure's "text … is typically the best and most reliable indicator of purpose"].)

The Fifth District's analysis in this case illustrates the perils of departing from those fundamental rules of interpretation. As even the Fifth District acknowledged, Proposition 48's text mentions only the statute (AB 277) that ratified North Fork's compact; it does not mention the concurrence. (Opn. 20 [the title and summary "do not expressly reference the concurrence power or the Governor's concurrence for the [North Fork] Madera site"].) Specifically, Proposition 48 states: "A 'Yes' vote approves, and a 'No' vote rejects, a statute that: Ratifies tribal gaming compacts *between the state and the North Fork Rancheria of Mono Indians* and the Wiyot Tribe."[5] Accordingly, Proposition 48 cannot reasonably be read to encompass the "distinct action" (*United Auburn*, *supra*, 10 Cal.5th at p. 554) of the Governor's concurrence.

Although the referendum's text is clear, the ballot materials that accompanied Proposition 48 confirm the point. (See *California Cannabis*, *supra*, 3 Cal.5th at 934 [court "may consider extrinsic sources, such as … ballot materials" if "the provision's intended purpose … remains opaque" after consulting the text].) The official analysis provided by the Legislative Analyst does not indicate that the ballot measure was intended to reverse the Governor's concurrence.[6] The bulk of the analysis

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[5] *Voting Information Guide for 2014, General Election*, *supra*, at 40 [italics added].

[6] While the analysis briefly mentions the Governor's role under IGRA, including that the Governor "approved" the Secretary's two-part determination, it does so only in a few sentences in the course of providing background about the role of the federal government in authorizing gaming in general and on

focuses on the history of AB 277 and the legal mechanism by which the state can enter into gaming compacts with tribes.[7] And the analysis' summary of the effects of the ballot measure makes no mention of the Governor's concurrence power. Rather, it states that a vote to approve "this proposition would allow AB 277, *the tribal-state compacts* with North Fork and Wiyot and the MOUs between the tribe and various governmental agencies, to go into effect."[8]

The Fifth District recognized that reading Proposition 48 to apply only to the statute ratifying the compact was the "literal[] interpretation" of the provision's text. (Opn. 22.) It reasoned, however, that because (1) the Attorney General's office drafted Proposition 48's title and summary, and (2) the Attorney General's office represented defendants below (who sought a narrow reading of Proposition 48), "reasonabl[e] doubts should be resolved in favor of the use of the referendum power." (Opn. 21-22 [citing *Associated Home Builders etc., Inc. v. City of Livermore* (*Associated Home*) (1976) 18 Cal.3d 582, 591].) But the *Associated Home* rule is not a tool for interpreting the language of a ballot measure; it applies only when determining whether a proposed initiative or referendum is valid under state law. (*Associated Home*, *supra*, 18 Cal.3d at pp. 590-596.) This Court

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the North Fork land in particular—and does not present the Governor's "approval" as an issue upon which the voters were asked to vote. (*Voting Information Guide for 2014, General Election*, *supra*, at p. 41.)

[7] *Ibid*.

[8] *Id.* at p. 42 [italics added].

has never adopted a contract-law-like rule that a ballot measure's title and summary should be construed against the Attorney General. To the contrary, the absence of the concurrence in the title and summary suggests that voters did not intend their vote to have any effect on the concurrence. (*People v. Valencia* (2017) 3 Cal.5th 347, 372) [if implications of ballot measure were "opaque to the Attorney General and Legislative Analyst," they "were almost certainly opaque to the average voter as well"].)

The Fifth District also stated that the "probability" was "extremely low" that voters intended to leave the Governor's concurrence in place while invalidating the compact and that it was more "reasonabl[e]" to read Proposition 48 as invalidating both the concurrence and the compact. But as discussed above, this Court determines voter intent based on the text of a ballot measure and, if necessary, the accompanying ballot materials. (See *supra* p. 33.)

Because under its "literal" reading, Proposition 48 does not annul the Governor's concurrence, the Fifth District should have interpreted the referendum to give the voters "'what they enacted, not more and not less.'" (*Pearson*, *supra*, 48 Cal.4th at p. 571.) The Fifth District's contrary logic would permit a referendum impliedly to repeal virtually any governmental act—no matter how long ago it occurred and even if it is not expressly referenced in the referendum itself—so long as the referendum targeted a statute relating to similar subject matter.[9] That is not

[9] For example, at least in theory, the Fifth District's mode of statutory analysis—which is divorced from the text, ballot

the law. (See *California Redevelopment Association v. Matosantos* (2011) 53 Cal. 4th 231, 260-261 ["[I]t would be unusual in the extreme for the people, exercising the legislative power by way of initiative, to adopt … a fundamental change only by way of implication."].)

## III. THE FIFTH DISTRICT'S DECISION OPENS THE DOOR TO SERIOUS MISUSE OF THE REFERENDUM PROCESS AND CREATES PROFOUND UNCERTAINTY REGARDING A WIDE RANGE OF PAST AND FUTURE EXECUTIVE ACTS

The Fifth District's decision holds that a referendum can annul an *executive* act (not a statute enacted by the Legislature); that the referendum can do so *retroactively* (after the act has already taken effect and affected parties have relied on it); and that the referendum can do so *impliedly* (without mentioning the act it purportedly annuls). Each of these elements of the Fifth District's holding is without precedent. Together, they contravene this Court's holding in *United Auburn*, contradict the text of the California Constitution, and create a dangerous ruling that could be used to justify any number of abuses of the referendum power.

As an initial matter, the Fifth District's ruling exposes any action taken by the Governor as part of a cooperative state-federal scheme to retroactive annulment years after the fact. Indeed, it would allow retroactive invalidation of the concurrence

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materials, and even basic canons of construction—could justify holding that a referendum challenging the addition of a newly protected class of Californians to the Unruh Civil Rights Act (Civ. Code § 51 *et seq.*) should be read to express disapproval of the Act as a whole.

upheld in *United Auburn* itself—even though the casino at issue there has already opened in reliance on the concurrence.[10] Moreover, as this Court has explained, there are numerous federal statutes that require the Governor to use his concurrence power in a manner similar to IGRA. (*United Auburn*, *supra*, 10 Cal.5th at pp. 559-561 [noting that "the effect of the Governor's concurrence under IGRA isn't materially distinct from that under other cooperative-federalism schemes"].) For example, the Governor must concur (or decline to concur) before:

- Army or Air National reservationists can be ordered to active duty (10 U.S.C. § 12301, subd. (b));
- Land can be acquired from the migratory bird conservation fund (16 U.S.C. § 715k-5);
- The EPA may grant waivers to allow construction of certain new source polluters (42 U.S.C. § 7411, subd. (j)(1)(A));
- The EPA may approve a conservation and management plan for an estuary (33 U.S.C. § 1330, subd. (f)(1)); or
- Parents may receive temporary assistance while unemployed or not engaged in community service (42 U.S.C. § 602, subd. (a)(1)(B)(iv)).

(*United Auburn*, *supra*, 10 Cal.5th at pp. 559-560.) Similarly, California Governors have exercised their power to concur in

[10] Hamann, *Look inside the $450 million Hard Rock Hotel & Casino in Wheatland*, Sac. Bus. J. (Oct. 30, 2019) <https://tinyurl.com/z67ryjhj>.

various high-profile programs under Medicare, the Comprehensive Environmental Response, Compensation, and Liability Act, the National Estuary Program, and the Coastal Zone Management Act. (*Id.* at p. 560.) The Fifth District's decision renders all these gubernatorial acts and others like them vulnerable to retroactive annulment by implication, notwithstanding the reliance of both the federal government and other affected parties on the Governor's actions.

In other words, although *United Auburn* recognized that "state and federal laws should be accommodated and harmonized where possible" and thus "declined" to interpret California law to "create … a conflict between state and federal law where none exists" (*id.* at p. 553), the Fifth District's decision opens the door to exactly such conflict via the indiscriminate use of the referendum power. Indeed, by allowing for post-hoc nullification of executive actions upon which the federal government has already relied, the Fifth District's decision calls into serious question whether California can continue to be a reliable partner in such cooperative federalism regimes. (Cf. *id.* at pp. 561-562 [explaining that state law contemplates that "the Governor is capable of playing a role in federal schemes that depend on the state government to convey an official position on behalf of the state of California"].)

More broadly, the Fifth District's ruling casts a shadow over any executive act that arguably has some "legislative aspect"—no matter how old or how many Californians may have relied upon it. That covers an enormous number of executive

actions. Executive officials "routinely exercise quasi-legislative authority in establishing general policies and promulgating general rules for the governing of affairs." (*Davis v. Municipal Ct.* (1988) 46 Cal.3d 64, 76.) The "clearest example" of this kind of executive action is an agency's "formulation and adoption of rules" (*Carrancho v. California Air Res. Bd.* (2003) 111 Cal.App.4th 1255, 1266), but other examples abound. An agency's decision to "initiate eminent domain proceedings and settle those proceedings" implicates the legislative power (*Santa Clarita Organization for Planning & Env't v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1102), as does "salary setting" (*Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1157), "imposing … fees" (*Home Builders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 561), and "distributing … funds" (*American Canyon Fire Prot. Dist. v. County of Napa* (1983) 141 Cal.App.3d 100, 106). Indeed, even the Governor's police power to take necessary actions during state-wide emergencies has a legislative aspect. (*Newsom v. Superior Ct.* (2021) 63 Cal.App.5th 1099, 1113.)

In sum, if the erroneous ruling below stands, then a range of essential and routine actions taken by the executive branch are at risk of being invalidated retroactively and by implication—creating a cloud of uncertainty that only this Court can dispel.

## CONCLUSION

The petition for review should be granted.

DATED: June 22, 2021

Respectfully submitted,

By: /s/ Christopher E. Babbitt
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## CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.504(d)(1), I hereby certify that the foregoing brief contains 8,109 words as counted by the word count feature of the Microsoft Word program used to generate this brief. This word count excludes the exempted portions of the brief as provided in Rule of Court 8.504(d)(3).

DATED: June 22, 2021 By: /s/ Christopher E. Babbitt
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# ADDENDUM

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| STAND UP FOR CALIFORNIA! et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>STATE OF CALIFORNIA et al.,<br><br>Defendants and Respondents;<br><br>NORTH FORK RANCHERIA OF MONO INDIANS,<br><br>Intervener and Respondent. | F069302<br><br>(Super. Ct. No. MCV062850)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Madera County. Michael J. Jurkovich, Judge.

Snell & Wilmer, Sean M. Sherlock, Todd E. Lundell, and Jing Hua, for Plaintiffs and Appellants.

Xavier Becerra, Attorney General, Sara J. Drake, William P. Torngren, and Timothy M. Muscat, Deputy Attorneys General, for Defendants and Respondents.

Maier Pfeffer Kim Geary & Cohen, John A. Maier; Wilmer Cutler Pickering Hale and Dorr, Danielle Spinelli and Christopher E. Babbitt, for Intervener and Respondent.

-ooOoo-

Plaintiffs Stand Up for California! and Barbara Leach (plaintiffs) brought this lawsuit to challenge the Governor's authority to concur in the decision of the United States Secretary of the Interior (Interior Secretary) to take 305 acres of land in Madera County into trust for North Fork Rancheria of Mono Indians (North Fork) for the purpose of operating a casino. The trial court sustained demurrers by North Fork and the state defendants— the State of California, the Governor, the Attorney General, the California Gambling Control Commission, and the Bureau of Gambling Control. In 2016, we reversed the judgment of dismissal, concluding the Governor lacked the authority to concur in the Interior Secretary's determination to take the Madera site into trust. (*Stand Up for California! v. State of California* (2016) 6 Cal.App.5th 686, 705.) The California Supreme Court granted review and held this case pending its decision in *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538 (*United Auburn*).

After deciding California law empowers the Governor to concur, the Supreme Court transferred this case back to us with directions to vacate our decision and reconsider the matter in light of *United Auburn*. We conclude the facts of this case are distinguishable from those in *United Auburn* because at the November 2014 general election California voters rejected the Legislature's ratification of the tribal-state compact for gaming at the Madera site. As described below, we conclude the people retained the power to annul a concurrence by the Governor and the voters exercised this retained power at the 2014 election by impliedly revoking the concurrence for the Madera site. As a result, the concurrence is no longer valid, and the demurrer should have been overruled.

We therefore reverse the judgment of dismissal.

## FACTS AND PROCEDURAL HISTORY

*Federal Statutes*

The history of federal and state regulation of gaming on Indian lands is set forth in *United Auburn* and need not be repeated in detail here. (See *United Auburn*, *supra*, 10 Cal.5th at pp. 544-547.) Two federal statutes relevant to this litigation are the Indian Reorganization Act of 1934 (IRA; 25 U.S.C. § 5101 et seq.) and the Indian Gaming Regulatory Act (IGRA; 18 U.S.C. §§ 1166-1167; 25 U.S.C. § 2701 et seq.). IRA authorizes the Interior Secretary to acquire land and hold it in trust to provide land for Indians. (*Carcieri v. Salazar* (2009) 555 U.S. 379, 381-382; 25 U.S.C. § 5108.) IGRA provides "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." (25 U.S.C. § 2702(1).) Class III gaming—the type of gambling practiced in casinos in Nevada (25 U.S.C. § 2703(6)-(8))—is lawful on Indian lands when certain statutory conditions have been met. (See 25 U.S.C. § 2710(d).) Additional conditions apply when, like the 305 acres in Madera County, the land was taken into trust after October 17, 1988. (See 25 U.S.C. § 2719; 25 C.F.R. § 292 (2008) ["Gaming on Trust Lands Acquired After October 17, 1988"].) One of those conditions—the Governor's concurrence—is the subject of this litigation.

The statutory text imposing this condition provides that land taken into trust after October 17, 1988, may be used for gaming if "the [Interior] Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, *but only if the Governor of the State in which the gaming activity is to be conducted concurs in the [Interior] Secretary's determination*." (25 U.S.C. § 2719(b)(1)(A), italics added.) For purposes of this opinion,

we refer to the Interior Secretary's determination under this IGRA provision as the two-part determination. IGRA does not grant the Governor the authority to concur—that authority must come from state law. (*United Auburn*, *supra*, 10 Cal.5th at pp. 548-549, fn. 4.)

*North Fork's Proposed Casino*

North Fork is a federally recognized Indian tribe with about 1,900 tribal citizens. It possesses a small rancheria in the Sierra Nevada foothills near the unincorporated community of North Fork. In March 2005, North Fork submitted a formal fee-to-trust application to the Bureau of Indian Affairs, requesting the United States Department of the Interior (DOI) take into trust for North Fork's benefit a 305-acre parcel in Madera County. The parcel is located on State Route 99 adjacent to the City of Madera, about 40 miles west of the rancheria. North Fork proposes building a hotel and casino with class III gaming on the site.

At the time of the fee-to-trust application, the parcel was owned by a subsidiary of North Fork's development partner. That entity, Nevada-based Station Casinos, LLC, is partially owned by Red Rock Resorts, Inc., a publicly traded company. Plaintiffs alleged North Fork and Station Casinos signed a casino management contract that gives Station Casinos the right to operate the casino and receive 24 percent of its net income.

In September 2011, the Interior Secretary made a two-part determination on North Fork's proposed casino, finding that taking the land into trust for the purpose of gaming would be in the best interest of North Fork and would not be detrimental to the surrounding community. (25 U.S.C. § 2719(b)(1)(A).) By letter dated August 30, 2012, the Governor concurred in the Interior Secretary's two-part determination. The Governor's letter expressed a reluctance to allow the expansion of gaming on land currently ineligible for it, but concurred "in this case because of several exceptional

circumstances." The Governor's concurrence fulfilled a condition set forth in IGRA. (25 U.S.C. § 2719(b)(1)(A).)

In November 2012, the Interior Secretary, having made his two-part determination and obtained the Governor's concurrence, issued a decision approving North Fork's fee-to-trust application for the 305-acre parcel. This decision was implemented in February 2013, when a grant deed conveying the 305 acres to the federal government in trust was executed by North Fork's development partner, accepted by the Interior Secretary, and recorded in the County of Madera.[1]

While the Governor was evaluating whether to concur in the Interior Secretary's two-part determination, he and North Fork negotiated a tribal-state compact under Government Code section 12012.25 and article IV, section 19, subdivision (f), of the California Constitution. Under IGRA, a tribal-state compact is one of the methods of legalizing class III gaming on Indian land. (25 U.S.C. § 2710(d)(1)(C).) Such compacts address many issues, including the scope of the games, standards for operating the games, regulatory responsibility, allocation of criminal and civil jurisdiction, liquor sales, and taxes on retail and restaurant outlets. (25 U.S.C. § 2710(d)(3)(C).)

The tribal-state compact negotiated by the Governor and North Fork authorized North Fork to conduct class III gaming on the 305-acre parcel. In exchange, North Fork agreed not to conduct gaming on its environmentally sensitive rancheria or elsewhere in California; agreed to make payments to the Chukchansi Tribe to mitigate the economic impact of the new casino on the existing Chukchansi casino; agreed to share revenue with

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**1** The validity of this fee-to-trust decision was challenged in a federal lawsuit. (See *Stand Up for California! v. U.S. Dept. of the Interior* (D.D.C. 2016) 204 F.Supp.3d 212, affirmed 879 F.3d 1177.) The District of Columbia Circuit concluded the decision to take the land into trust for North Fork "was reasonable and consistent with applicable law" and affirmed the district court's grant of summary judgment in favor of DOI. (*Stand Up for California! v. U.S. Dept. of the Interior* (D.C. Cir. 2018) 879 F.3d 1177, 1192.)

the Wiyot Tribe in order to enable that tribe to forgo gaming on its environmentally sensitive land near Humboldt Bay National Wildlife Refuge; agreed to participate in a revenue-sharing scheme to benefit other tribes without casinos; and submitted to detailed regulations for the operation of its casino.

The Governor and North Fork executed the compact on August 31, 2012, the day after the Governor signed his concurrence letter. Under California's Constitution, such compacts are "subject to ratification by the Legislature." (Cal. Const., art. IV, § 19, subd. (f).) Accordingly, the Governor forwarded the compact to the Legislature for its approval.

*This Lawsuit*

In March 2013, plaintiffs filed a complaint alleging the Governor violated the California Constitution when he concurred in the Interior Secretary's two-part determination. As amended, the complaint named as defendants the State of California, the Governor, the Attorney General, the Gambling Control Commission, and the Bureau of Gambling Control. The complaint alleged the Governor had no authority to concur and prayed for a writ of mandate setting aside the concurrence.

While the lawsuit was pending, both houses of the Legislature passed Assembly Bill No. 277, which added section 12012.59 to the Government Code. Subdivision (a)(1) of the new section stated: "The tribal-state gaming compact entered into in accordance with the federal Indian Gaming Regulatory Act [citations] between the State of California and the North Fork Rancheria Band of Mono Indians, executed on August 31, 2012, is hereby ratified." Subdivision (b) of the new section provided that, in deference to tribal sovereignty, certain actions were not subject to the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.). The Governor signed it on July 3, 2013, and it became chapter 51 of the Statutes of 2013. The ratified compact was forwarded to the Interior Secretary, who published a notice in the Federal Register, stating that the

compact was approved and was taking effect to the extent it was consistent with IGRA. (78 Fed.Reg. 62649 (Oct. 22, 2013).)

In July 2013, Cheryl Schmit, using the letterhead of Stand Up for California!, asked the Attorney General for a title and summary for a proposed statewide referendum rejecting the compact ratification statute, chapter 51 of the Statutes of 2013. The Attorney General issued an official title and summary for the measure that stated:

> "**REFERENDUM TO OVERTURN INDIAN GAMING COMPACTS.** If signed by the required number of registered voters and timely filed with the Secretary of State, this petition will place on the statewide ballot a challenge to a state law previously approved by the Legislature and the Governor. The law must then be approved by a majority of voters at the next statewide election to go into effect. The law ratifies two gaming compacts (with the North Fork Rancheria of Mono Indians, and the Wiyot Tribe); and it exempts execution of the compacts, certain projects, and intergovernmental agreements from the California Environmental Quality Act. (13-0007.)"

The proponents of the petition had until October 1, 2013, to submit voter signatures in support of the petition to county election officials.

In August 2013, North Fork, which was not originally a party to the litigation initiated by plaintiffs' complaint, was granted leave to intervene. North Fork filed a cross-complaint, seeking a declaratory judgment stating the referendum petition was invalid. The cross-complaint and its subsequent dismissal are not material to the resolution of this appeal.

North Fork and the state defendants demurred to plaintiffs' complaint, which alleged the Governor's concurrence was unauthorized. In March 2014, the trial court sustained the demurrers. In its written ruling, the court stated that the Governor's power to concur arose by implication from his authority to negotiate and execute tribal-state compacts, as set forth in article IV, section 19, subdivision (f), of the California Constitution. Because the Governor was authorized to negotiate compacts for gaming on Indian land, and some such compacts, including the one at issue in this case, cannot come

into effect unless the land in question is taken into trust by the federal government with the Governor's concurrence, the Governor must have the power to concur. The court rejected plaintiffs' argument that when the voters added article IV, section 19, subdivision (f), to the California Constitution via Proposition 1A in 2000, they intended to deny to the state the authority to approve Indian casinos on land that was not Indian land at the time, so that there could be no casinos on newly added trust land. Plaintiffs conceded they could not cure their complaint by amendment, so the demurrers were sustained without leave to amend. A defense judgment was entered on March 12, 2014. Plaintiffs timely appealed.

*Proposition 48*

While this appeal was pending, the proponents of the referendum on the statute ratifying the compacts obtained a sufficient number of valid petition signatures to qualify the referendum for the November 4, 2014 general election ballot. The measure was designated Proposition 48 and submitted to the electorate. At the election, approximately 4.2 million Californians (61 percent) voted "No" on Proposition 48, thereby rejecting the ratification statute. (Historical and Statutory Notes, 32E pt. 1 West's Ann. Gov. Code (2016 supp.) foll. § 12012.59, p. 13.)

*Federal Litigation*

As a result of the voters' rejection of the tribal-state compact, the state refused to negotiate another compact with North Fork. In March 2015, North Fork filed an action in the United States District Court for the Eastern District of California to compel the state to negotiate a new compact in good faith. (*Stand Up for California! v. U.S. Dept. of the Interior* (E.D.Cal. 2018) 328 F.Supp.3d 1051, 1056, affd. in part & revd. in part (9th Cir. 2020) 959 F.3d 1154.) In November 2015, the district court granted North Fork's request and ordered North Fork and the state to conclude a compact within 60 days. (*Id*. at p. 1057.) Pursuant to IGRA, the district court then sent the matter to mediation, which did

not produce a settlement. (*Ibid*.) In July 2016, the Interior Secretary approved a document called Secretarial Procedures for the North Fork Rancheria of Mono Indians (the secretarial procedures) for the purpose of authorizing class III gaming on the 305-acre site in the absence of a state-approved compact. (*Ibid*.) The secretarial procedures, which are 102 pages long (excluding the table of contents and appendices), contain detailed provisions governing how the gaming will be conducted and many other issues. A DOI letter dated July 29, 2016, notified North Fork that the secretarial procedures were in effect.

In November 2016, Stand Up for California! and others filed another lawsuit against DOI in the United States District Court for the Eastern District of California to challenge the secretarial procedures. (*Stand Up for California! v. U.S. Dept. of the Interior*, *supra*, 959 F.3d at pp. 1157-1158.) The district court granted the DOI's motion for summary judgment. (*Id*. at p. 1158.) In May 2020, the Ninth Circuit determined the secretarial procedures complied with the federal Administrative Procedure Act. (*Stand Up for California! v. U.S. Dept. of the Interior*, *supra*, at pp. 1156-1157, 1162.) However, the court remanded the case for further proceedings to determine whether the issuance of the secretarial procedures complied with federal environmental statutes. (*Id*. at p. 1166.)

*This Appeal*

In December 2016, this court issued an opinion concluding that, in the circumstances presented, the Governor lacked the authority to concur in the Interior Secretary's two-part determination. (*Stand Up for California! v. State of California*, *supra*, 6 Cal.App.5th at p. 705.) Each member of the panel adopted a different rationale to reach this conclusion.

The state and North Fork filed petitions for review. In March 2017, the California Supreme Court granted the petitions and deferred consideration pending the outcome of *United Auburn*.

On August 31, 2020, the California Supreme Court filed its decision in *United Auburn*, concluding "that California law empowers the Governor to concur." (*United Auburn*, *supra*, 10 Cal.5th at p. 543.) A month and a half later, the Supreme Court transferred the present case back to this court "with directions to vacate its decision and reconsider the matter in light of *United Auburn v. Newsom* (2020) 10 Cal.5th 538. (Cal. Rules of Court, rule 8.528(d).)" In accordance with these directions and the California Rules of Court, we allowed all parties to submit an opening brief followed by a brief addressing the points raised by their opponents.

## DISCUSSION

### *I. United Auburn*

Pursuant to the Supreme Court's transfer order, our task is to determine whether the Governor's concurrence in the Interior Secretary's two-part determination for the Madera site is valid. We start by describing the holding in *United Auburn* and the analysis the high court used to define the Governor's concurrence power.

The Supreme Court held "that current California law permits the Governor's concurrence in the Interior Secretary's determination to allow class III gaming on Indian land taken into trust for an Indian tribe after IGRA was enacted." (*United Auburn*, *supra*, 10 Cal.5th at p. 564.) The concurrence upheld in *United Auburn* was set forth in a letter from the Governor dated August 30, 2012. (*Id*. at p. 547.) That date has significance in this case because the Governor's concurrence letter addressing the Madera site also was dated August 30, 2012.

The Supreme Court stated its conclusion about the Governor's concurrence authority was "supported by the Governor's historical practice of concurring under a

variety of federal statutes, the legislatively enacted expectation that the Governor represent the state's interests in negotiations or proceedings involving the federal government, and the absence of any explicit constitutional or statutory limits on the Governor's power to concur in the Interior Secretary's determination under IGRA." (*United Auburn*, *supra*, 10 Cal.5th at p. 544.) The court described the foregoing as "markers of the legal terrain [that] help us map a zone of twilight between the powers of the Governor and the Legislature. But they also convey why legislative changes can, by bringing any implicit gubernatorial power to 'its lowest ebb' in this domain, restrict or eliminate the Governor's concurrence power. (*Youngstown Co. v. Sawyer* (1952) 343 U.S. 579, 637 (conc. opn. of Jackson, J.) (*Youngstown*).) Because the Legislature has imposed no such restriction, however, we conclude the Governor acted lawfully when he concurred in the Interior Secretary's determination" relating to proposal for the Enterprise Rancheria of Maidu Indians. (*United Auburn*, *supra*, 10 Cal.5th at p. 544.)

The Supreme Court discussed the relationship of Proposition 1A to the Governor's implicit power to concur. Proposition 1A added article IV, section 19, subdivision (f), to the California Constitution, which states in full:

> "Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts."

The Supreme Court noted the parties' agreement that Proposition 1A provided the starting point for an analysis of the concurrence power. (*United Auburn*, *supra*, 10 Cal.5th at p. 550.) Addressing the text of Proposition 1A, the court stated it did not expressly grant the Governor the power to concur. (*Ibid*.) The court also considered the reference to federal law and concluded it "does not, by itself, bestow the Governor with

the concurrence power." (*Ibid*.) Next, the court concluded the absence of an express grant of concurrence authority did not resolve the question because "each branch of government possess certain inherent or implied powers." (*Id*. at p. 551.) Consequently, the remainder of the court's discussion addressed whether the Governor's concurrence was an implicit power.

Proposition 1A expressly authorized the Governor to negotiate and conclude tribal-state compacts for gaming on Indian lands. Accordingly, the Supreme Court considered whether the express grant of authority to enter compacts impliedly granted the authority to concur. (*United Auburn*, *supra*, 10 Cal.5th at p. 554.) The court concluded the power to negotiate compacts did not, by itself, imply the grant of an implied power to concur. (*Ibid.*) Nonetheless, the court determined the power to negotiate compacts was "consistent with the Governor exercising his inherent power to concur to allow class III gaming on" land taken into trust after IGRA was enacted. (*Ibid*.)

The Supreme Court examined the ballot materials for Proposition 1A, discussed inferences that could be drawn from those materials, and found no reason to conclude the Governor was barred from concurring in the Interior Secretary's two-part determination. (*United Auburn*, *supra*, 10 Cal.5th at p. 556.) Those materials do not address the specific questions of law raised in this appeal.

The court also addressed how separation of power concerns affected the Governor's power to concur and included a historical analysis of the power to concur in other contexts. (*United Auburn*, *supra*, 10 Cal.5th at pp. 558-563.) Ultimately, the court concluded the Governor had the authority to concur and stated the concurrence authority was "consistent with his historic practice of concurring in a variety of cooperative-federalism schemes, and his role as the state's representative under Government Code section 12012." (*Id*. at p. 563.) As a result, the court found "it consistent with Proposition 1A and our separations of powers jurisprudence to conclude that, despite the

absence of specific legislative authorization, California law empowers the Governor to concur." (*Ibid*.)

The last step of our overview of *United Auburn* describes some of the limitations on the Governor's implicit power to concur in the Interior Secretary's two-part determination. The court stated the power to concur falls within a " 'zone of twilight' … where legislative 'inertia, indifference or quiescence' invites the exercise of executive power." (*United Auburn*, *supra*, 10 Cal.5th at p. 563.) The court stated the Governor's implicit concurrence power "isn't an indefeasible one" and the legislative branch may enact legislation reducing that power. (*Ibid*.) Specifically, "the Legislature may restrict or eliminate the Governor's implicit power to concur." (*Id*. at p. 564.) The court determined there was no state law creating such a limitation and, thus, the Governor had the power to concur in the Interior Secretary's two-part determination in that case. (*Ibid*.)

## *II. Role of Proposition 48*

### A. Contentions

Plaintiffs contend the Governor's concurrence for the Madera site is invalid under the unique facts of this case. They argue the Governor's inherent or implied power to concur is not an indefeasible one and exists in a "zone of twilight" that is dependent upon legislative inaction. Plaintiffs assert no such inaction exists because voters exercised their legislative function in rejecting Proposition 48, the referendum seeking ratification of a tribal-state compact for North Fork's proposed casino. Based on the outcome of the referendum, plaintiffs contend this case is easily distinguished from *United Auburn* because the state's legislative apparatus was not indifferent to and did not acquiesce in the Governor's exercise of an authority to concur in the proposed class III gaming at the Madera site.

The state contends the ratification or rejection of the tribal-state compact is irrelevant because the Governor's concurrence power does not depend upon a valid

compact. Under the state's interpretation of Proposition 48, it addressed only the compact. It did not address the Governor's previous concurrence in the Interior Secretary's two-part determination for the Madera site or, more generally, the Governor's authority to concur. Thus, in the state's view, Proposition 48 cannot be interpreted as negating the Governor's exercise of the concurrence authority he clearly held on August 30, 2012. Summarizing its position, the state asserts: "No law limits the Governor's power to concur, and Proposition 48 did not create any such law."

North Fork contends the rationale that the Governor's implied power does not survive in a case where the voters have vetoed an exercise of the express power on which the implied power is based did not survive *United Auburn* because Proposition 48 was not a legislative action limiting the Governor's concurrence authority. North Fork argues there are multiple reasons why Proposition 48 cannot be treated as an implicit, retroactive restriction on the Governor's concurrence authority. North Fork starts with the Supreme Court's conclusion that "current California law permits the Governor's concurrence" (*United Auburn*, *supra*, 10 Cal.5th at p. 564) and its statement that "the Legislature has imposed no … restriction" on the Governor's authority. (*Id*. at p. 544.) Next, North Fork argues Proposition 48 was not enacted by the Legislature, implying that only the Legislature, not the voters, has the ability to impose a restriction on the Governor's authority. North Fork also joins the state's textual argument and asserts Proposition 48 did not pertain to the concurrence authority and, thus, did not purport to restrict it. North Fork argues a voter referendum addressing a distinct, legislative act cannot impliedly, and retroactively, divest the Governor of the concurrence power the Supreme Court held he possesses.

B. The People's Authority to Invalidate a Concurrence

The parties' contentions raise a series of questions about the authority of the people to eliminate or invalidate a concurrence given by the Governor. *United Auburn* did not resolve these questions of constitutional law.

*1. Retroactive Annulment*

The first question is whether the Governor's concurrence, once given, can be invalidated by subsequent action of the electorate. This question has a dual aspect involving the people's authority and the timing of the exercise of that authority. North Fork described the timing aspect as "the troublesome retroactivity question." North Fork did not explicitly address the aspect of the question involving the people's authority. However, its argument that *United Auburn* envisioned an affirmative act by the Legislature to prospectively limit the Governor's authority implies the people lack the authority to invalidate a concurrence already given.

The facts presented in *United Auburn* did not raise the question of the authority of the Legislature or the people to annul a concurrence given by the Governor. As a result, the Supreme Court did not decide the question or discuss it in dicta. (See *Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077, 1093 [our high court's dicta usually are followed unless there is a compelling reason not to do so].) In particular, the court did not state a concurrence issued by the Governor could *never* be revoked or annulled by either the Legislature or California's voters or, alternatively, a Governor's concurrence was *always* subject to revocation or annulment by the Legislature or the people. Similarly, the court did not address a middle ground and identify the circumstances in which the Legislature or the people could, or could not, revoke a concurrence given by the Governor.

In the absence of express guidance from the Supreme Court, we turn to the California Constitution, which "is the fundamental and supreme law of this state as to all matters within its scope." (*Dye v. Council of City of Compton* (1947) 80 Cal.App.2d 486,

490 (*Dye*).) The foundation of our state government is the principle that "[a]ll political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." (Cal. Const., art. II, §1; see *McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162, 1184 [our Constitution recognizes that in our democratic system all political power derives from the people].) The court in *Dye* provided an explanation of the constitutional term "political power" by stating "all governmental power, legislative or otherwise, is derived from the people." (*Dye*, *supra*, at pp. 489-490.) Another constitutional provision defines the Governor's authority: "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." (Cal. Const., art. V, § 1.) The relationship between the people and the Governor is defined in part by the people's express authority to recall elective officers such as the Governor. (Cal. Const., art. II, §§ 13, 14.) Thus, under the California Constitution, the Governor is not an independent co-equal of the people. Any power the Governor possesses is derived from them.

These constitutional provisions are general in nature and do not provide a specific answer to the question of whether a concurrence, once given, can be revoked or annulled by the people. Consequently, with these constitutional principles in mind, we return to *United Auburn* and its description of the scope and nature of the Governor's implicit power to concur in the Interior Secretary's two-part determination. As quoted earlier, the Supreme Court stated legislative changes could restrict or eliminate the Governor's concurrence power. (*United Auburn*, *supra*, 10 Cal.5th at p. 544.) The court also stated the concurrence power "isn't an indefeasible one." (*Id.* at p. 563.) The court did not define what it meant by "indefeasible." As a result, we conclude the court used the word "indefeasible" in its ordinary sense, rather than in an undisclosed, technical sense. "[T]o ascertain the ordinary, usual meaning of a word, courts appropriately refer to the

dictionary definition of that word." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122.)

The adjective "defeasible" means "capable of being or liable to being voided, annulled, or undone **:** subject to defeasance esp. by being cut off through the exercise of a power or the happening of an event." (Webster's 3d New Internat. Dict. (1993) p. 590.) The noun "defeasance" means defeat, overthrow, undoing or "rendering null or void." (*Ibid*.) Accordingly, the adjective "indefeasible" is defined as "not capable of or not liable to being annulled or voided or undone." (*Id*. at p. 1147.) These terms have the same meanings when used in a legal context. Black's Law Dictionary (8th ed. 2004) defines "defeasible" as "capable of being annulled or avoided" and "indefeasible" as "not vulnerable to being defeated, revoked, or lost." (*Id*. at pp. 449, 783.)

Based on section 1 of article II of the California Constitution, our Supreme Court's description of the concurrence power as defeasible, and its use of the "zone of twilight" metaphor (*United Auburn*, *supra*, 10 Cal.5th at pp. 544, 563), we conclude the people of California retained the authority to annul a concurrence in the Interior Secretary's two-part determination after it has been issued by the Governor. In other words, the Governor's exercise of the defeasible concurrence power is itself an act capable of being avoided or undone by the people. No party has presented a different interpretation of section 1 of article II of the California Constitution.

*2. How the Authority to Annul is Exercised*

The second legal question addresses the proper mechanism for the people's exercise of their power to annul a Governor's concurrence after it is given. Proposition 48 was a referendum, not an initiative, and, therefore, the question considered here is limited to whether the people's authority to revoke a concurrence may be exercised by referendum. We regard this legal question as separate from the question of whether the

particular referendum in this case, Proposition 48, actually exercised that authority and annulled the Governor's August 30, 2012 concurrence for the Madera site.

North Fork argues legislation is required to limit the concurrence power, a referendum does not enact legislation, and, therefore, Proposition 48 cannot be viewed as legislation annulling the Governor's concurrence. The state also addresses whether a referendum is an appropriate mechanism for revoking a concurrence. The state argues the electorate's referendum power is limited to acts that are legislative in nature and the Governor's concurrence power is an executive power that is not subject to referendum.

Referendum are addressed in article IV, section 1 of the California Constitution, which provides in full: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." Article II, section 9, subdivision (a) provides: "The referendum is the power of the electors to approve or reject statutes or parts of statutes" subject to certain exceptions inapplicable in this appeal.

California courts routinely recognize their duty to jealously guard the right of the people to the initiative and referendum. (E.g., *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1125; *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117.) " 'If doubts can reasonably be resolved in favor of the use of this reserve power, court will preserve it.' " (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) Courts have implemented this principle by adopting a general rule requiring referendum provision be liberally construed to uphold the power. (*Ibid*.; *Rossi v. Brown* (1995) 9 Cal.4th 688, 703.)

The arguments presented by North Fork and the state defendants rooted in concepts of "executive" authority and "legislative" acts are not especially useful in view of the Supreme Court's use of a flexible, nonformalistic approach. (*United Auburn*, *supra*, 10 Cal.5th at p. 558.) The court stated: "Rather than attempt to characterize the

Governor's concurrence power as a wholly legislative or executive one, we construe the power as containing features that cut across both categories." (*Id*. at p. 559.)

Accordingly, we reject the state defendants' formalistic argument that the Governor's concurrence is an executive act and, as such, is not subject to referendum. (See *Pacific Rock & Gravel Co. v. City of Upland* (1967) 67 Cal.2d 666, 669 [executive or administrative acts are not subject to the power of referendum].) The power to concur contains features that are both legislative and executive in nature. (See *United Auburn*, *supra*, 10 Cal.5th at p. 559 [concurrence power is not wholly legislative or executive; it is construed "as containing features that cut across both categories"].) This combination of legislative and executive functions is why section 1 of article V of the California Constitution, which vests "supreme executive power" in the Governor, does not compel a conclusion that the people possess no authority to revoke a concurrence or, alternatively, a referendum is not the appropriate mechanism for exercising the people's authority to annul a concurrence.

The power of referendum is "the power of the electors to approve or reject statutes or parts of statutes." (Cal. Const., art. II, § 9, subd. (a).) We interpret the Constitution's phrase "statutes or parts of statutes" as referring to legislative actions. This interpretation is based on the principle that reasonable doubts about the referendum power should be resolved in favor of its use. (See *Associated Home Builders etc., Inc. v. City of Livermore*, *supra*, 18 Cal.3d at p. 591.) When the Governor issues a concurrence in the Interior Secretary's two-part determination, the power being exercised is not wholly legislative or executive, but cuts across both categories. (*United Auburn*, *supra*, 10 Cal.5th at p. 559.) The legislative aspect of a concurrence renders it subject to the power of referendum and the constitutional provisions stating the supreme executive power is vested in the Governor does not insulate a concurrence from the reach of a referendum. (See Cal. Const., art. V, § 1 [executive power].) Thus, we conclude a referendum is an

appropriate mechanism for annulling a Governor's concurrence in the Interior Secretary's two-part determination.

*3. Implied Annulment*

In this case, plaintiffs contend Proposition 48 invalidated the Governor's concurrence. The official title and summary for Proposition 48, which were prepared by the Attorney General, do not expressly reference the concurrence power or the Governor's concurrence for the Madera site. Consequently, the facts of this case raise a third issue of constitutional law—specifically, whether the people may *impliedly* annul the Governor's concurrence.

In *Youngstown*, *supra*, 343 U.S. 579, the concurring opinion of Justice Jackson stated:

> "When the President takes measures incompatible with the *expressed or implied will* of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution for what is at stake is the equilibrium established by our constitutional system." (*Id*. at pp. 637-638, italics added.)

This statement about the relationship between the powers of the executive and the will of the legislative body does not translate directly to the present case. Here, however, we are not concerned with the relationship between two branches of government, but the relationship between the state's executive officer and the people. Identifying the equilibrium established by our state constitution in that relationship must reflect the fundamental principle that all political power is derived from the people. (Cal. Const., art. II, §1; see *McClatchy Newspapers v. Superior Court*, *supra*, 44 Cal.3d at p. 1184.) Based on this constitutional principle about power, and our Supreme Court's reliance on Justice Jackson's reference to the implied will of Congress, we conclude the people may

impliedly express their will to annul a concurrence issued by the Governor. Where a constitutional power is implicit—that is, has been impliedly granted by the people to the Governor—an appropriate balance is struck by recognizing the people may impliedly annul an exercise of that power. In other words, by parity of reasoning, that which the people granted by implication can be annulled by implication.

*4. Proposition 48*

Based on the foregoing legal conclusions about the people's power and the use of referenda, we consider whether Proposition 48 is properly interpreted as an exercise of the people's authority to annul the Governor's August 30, 2012 concurrence.

Plaintiffs contend "the State's electorate explicitly rejected the off-reservation casino at issue here" by voting on Proposition 48, which provided clear evidence of legislative disapproval of the Governor's exercise of the concurrence power for the Madera site. Plaintiffs characterize the vote on Proposition 48 as a veto of all the Governor's actions related to the compact with North Fork.

In contrast, the state defendants argue Proposition 48 did not eliminate the Governor's previous concurrence or the Governor's power to concur. North Fork also contends Proposition 48 did not "purport to restrict the Governor's concurrence power." North Fork further asserts there is no authority supporting plaintiff's contention that a voter referendum addressing a distinct legislative act can impliedly revoke a concurrence issued by the Governor. Under North Fork's view, Proposition 48 addressed the compact-ratifying statute, kept it from coming into effect, and did not pertain to the concurrence, which is entirely separate from the negotiation, execution and ratification of a compact.

Initially, we consider who drafted Proposition 48. While not decisive, the fact by the official title and summary was prepared by the Attorney General's Office, which is representing the state defendants, supports applying the general principle that reasonably

doubts should be resolved in favor of the use of the referendum power. (See *Associated Home Builders etc., Inc. v. City of Livermore*, *supra*, 18 Cal.3d at p. 591.)

Our analysis of the voter's intent in rejecting Proposition 48 also includes the consideration of the consequences that flow from the competing interpretations of Proposition 48. (Cf. *Zieve, Brodnax & Steele, LLP v. Dhindsa* (2020) 49 Cal.App.5th 27, 35 [when construing statutory language, courts consider the consequence that will flow from a particular interpretation].) We adopt this approach to interpreting referenda because it is unrealistic to adopt an approach holding the people vote on a referendum without considering the consequences of their vote.

Accordingly, we consider what intent is logically implied by the strict (i.e., literal) interpretation proffered by North Fork and the state defendants. Restricting the voter's rejection of the compact-ratifying statute to the compact itself is the equivalent of inferring the voter's intended to approve the Governor's concurrence. A consequence of this implied approval of the concurrence is that class III gaming would be permitted to occur on the Madera site, but would not be governed by the terms of the compact. Instead, the gaming would be governed by secretarial procedures. (See 25 U.S.C. § 2710(d)(7)(B)(vii) [after mediation, Secretary shall prescribe procedures for the conduct of the class III gaming that are consistent with the proposed compact selected by the mediator].) In this case, those procedures had yet to be adopted when Proposition 48 was rejected in November 2014. Instead, the secretarial procedures were put in place in July 2016. Accordingly, the approach of North Fork and the state defendants treats the voters as rejecting the tribal-state compact negotiated by the Governor and favoring the secretarial procedures that would be subsequently created and imposed by the federal government pursuant to IGRA. The probability of this approach accurately identifying the people's will is, in our view, extremely low.

In comparison, the voter's rejection of the compact-ratifying statute is reasonably interpreted as an expression of their intent to reject class III gaming on the 305-acre Madera site taken into trust in February 2013. This rejection of class III gaming at the Madera site implies the voters disapproved the Governor's concurrence in the Interior Secretary's two-part determination because that concurrence is one of IGRA's conditions that must be satisfied for class III gaming to be allowed at the site. (See 25 U.S.C. § 2719(b)(1)(A).) Therefore, we conclude the people's rejection of Proposition 48 impliedly expressed their will to annul the Governor's August 30, 2012 concurrence for the Madera site. As a result, the demurrers of North Fork and the state defendants should have been overruled.

**DISPOSITION**

The judgment is reversed and matter is remanded for further proceedings. The trial court is directed to vacate its order sustaining the demurrers and enter a new order overruling them. Appellants are awarded costs on appeal.

Smith

SMITH, J.

WE CONCUR:

Detjen

DETJEN, Acting P.J.

Franson

FRANSON, J.

## CERTIFICATE OF SERVICE

*Stand Up For California! et al. v. State of California et al., North Fork Rancheria of Mono Indians, Fifth Appellate District, Case No. F069302*
*Madera County Superior Court, Case No. MCV062850*

I, the undersigned, declare:

I am employed in Los Angeles County, State of California. I am over the age of 18 and not a party to the within action. My business address is 350 S. Grand Avenue, Suite 2400, Los Angeles, California 90071.

On June 22, 2021, I caused the foregoing document described as:

**PETITION FOR REVIEW**

to be deposited with the U.S. Postal Service by placing the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Wilmer Cutler Pickering Hale and Dorr LLP, 350 South Grand Avenue, Suite 2400, Los Angeles, California 90071, addressed as set forth above. I am readily familiar with the firm's practice for collecting and processing correspondence mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed as follows:

**SEE ATTACHED SERVICE LIST**

In addition, I served the documents in the manner described below:

☒ **BY ELECTRONIC SERVICE (via TrueFiling):** I served upon the designated recipients via electronic transmission through the TrueFiling system on June 22, 2021. Upon completion of said transmission of said documents, a certified receipt is issued to filing party acknowledging receipt by TrueFiling's system. Once TrueFiling has served all designated recipients, proof of electronic service is returned to the filing party.

To the following recipient:

Fifth District Court of Appeal of California
2424 Ventura St.,
Fresno, CA 93721
Clerk: (559) 445-5491

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 22, 2021, at Los Angeles, California.

Jill Folsom

**SERVICE LIST**

*Stand Up For California! et al. v. State of California et al., North Fork Rancheria of Mono Indians, Fifth Appellate District, Case No. F069302*
*Madera County Superior Court, Case No. MCV062850*

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